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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 164

COUNTY OF SPOKANE AND COUNTY OF WHITMAN, Washington, petitioners

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE UNITED STATES

OPINION BELOW

The only opinion below is that of the Supreme Court of the State of Washington, which is reported under the title *Exchange National Bank of Spokane* v. *United States*, in 147 Wash. 176. (R. 64–75.)

JURISDICTION

The judgment of the Supreme Court of the State of Washington was entered on April 30, 1928. (R. 77.) The petition for certiorari was filed May 31, 1928. Certiorari was granted on October 8, 1928.

(R. 79.) Jurisdiction is conferred upon this Court by Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Is a debt due the United States, for taxes, entitled to priority over a similar debt due a subdivision of a State under Section 3466 of the Revised Statutes which provides that "whenever any person indebted to the United States is insolvent, • • • the debts due to the United States shall be first satisfied?"

2. Does the lien given under Section 3186 of the Revised Statutes confer upon the United States a right to satisfy its tax claim in preference to the right of a State, or its agencies, against the same fund, for State taxes?

CONSTITUTION AND STATUTES INVOLVED

The pertinent provisions of the Constitution of the United States are as follows:

> ARTICLE I
>
> SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, • • •;
>
> • • • • •
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

ARTICLE VI

* * * * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Revised Statutes, Section 3186, as amended, c. 344, 43 Stat. 994 (U. S. C., Title 26, Sec. 115), provides:

That if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person: *Provided, however,* That such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector in the office of the clerk of the district court of the district within which the property subject to such lien is situated * * *.

Revised Statutes, Section 3466 (U. S. C., Title 31, Sec. 191), reads:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

Pierce's Washington Code 1919, Section 6957, 6958 and 6979 (pp. 1916, 1917, 1922), are as follows:

> SECTION 6957. *Collection of Personal Property Taxes—Notice—Removal of Property.*—On and after the first Monday of February succeeding the levy of taxes the county treasurer shall proceed to collect all personal property taxes. He shall give notice by mail to all persons charged with personal property taxes and if such taxes are not paid within thirty days after said notice, he shall distrain sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the same, together with all accruing costs, with interest and shall immediately proceed to

advertise the same by posting written notices thereof in three public places in the county in which such property has been levied upon, stating the time when and place where such property will be sold, and if the taxes for which such property is distrained, and the costs which accrue thereon, are not paid before the date appointed for such sale, which shall be not less than ten days after the taking of such property, such treasurer shall proceed to sell such property at public auction or so much thereof as will be sufficient to pay such taxes with interest and costs, and if there be any overplus of money arising from the sale of any personal property, the treasurer shall immediately pay any such overplus to the owner of the property so sold, or to his legal representatives: Provided, That if any personal property, upon which the taxes have been levied but not paid, is about to be removed from the county where the same has been assessed, the county treasurer may demand such taxes without the notice provided for in this section, and if necessary, may distrain and sell sufficient goods and chattels to pay the same.

SECTION 6958. *Later Section, Collection of Personal Taxes—Distraint—Removal.*—On the first Monday in February succeeding the levy of taxes, the county treasurer shall proceed to collect all personal property taxes. He shall give notice by mail to all persons charged with personal property taxes, and if such taxes are not paid on or before the

15th day of March of such year, he shall forthwith proceed to collect the same. In the event that he is unable to collect the same in due course, he shall prepare papers in distraint, which shall contain a description of the personal property, the amount of the tax, the amount of accrued interest at the rate of fifteen per cent. per annum from March 15th, and the name of the owner or reputed owner, and shall file the same with the county sheriff, who shall immediately without demand or notice distrain sufficient goods and chattels belonging to the person charged with such taxes to pay the same with interest at the rate of fifteen (15) per cent. per annum from the 15th day of March of such year, together with all accruing costs, and shall immediately proceed to advertise the same by posting written notices in three public places in the county in which such property has been levied upon, one of which places shall be at the county court house, such notices to state the time when and place where such property will be sold. If the taxes for which such property is distrained and the interest and cost accruing thereon are not paid before the date appointed for such sale, which shall not be less than ten (10) days after the taking of such property, such sheriff shall proceed to sell such property at public auction, or so much thereof as shall be sufficient to pay such taxes with interest and costs, and shall pay to the treasurer the money so collected at such sale, and if there be any overplus of money arising from the

sale of any personal property, the treasurer shall immediately pay such overplus to the owner of the property so sold, or to his legal representative: Provided, That whenever it shall become necessary to distrain any standing timber owned separately from the ownership of the land upon which the same may stand, or any fishtrap, pound-net, reef-net, set-net, drag-seine fishing location, which shall be deemed to have been distrained and taken into possession when the said sheriff shall have, at least thirty (30) days before the date fixed for the sale thereof, filed with the auditor of the county wherein such property is located, a notice in writing citing that he has distrained such property, describing it, giving the name of the owner or reputed owner, the amount of tax due with interest, and the time and place of sale. A copy of said notice shall also be sent to the owner or reputed owner at his last known address by registered letter at least thirty (30) days prior to the date of sale: And provided, further, That if any personal property upon which taxes have been levied, but not paid, is about to be removed from the county where the same has been assessed, the county treasurer may demand such taxes without the notice provided for in this section, and if necessary may distrain sufficient goods and chattels to pay the same as provided in this act.

SECTION 6979. *When Lien Commences.*—The taxes assessed upon real property shall

be a lien thereon from and including the first day of March in the year in which they are levied until the same are paid, but as between a grantor and grantee, such lien shall not attach until the first Monday of February of the succeeding year. The taxes assessed upon personal property shall be a lien upon all the real and personal property of the person assessed, from and after the date upon which such assessment is made, and no sale or transfer of either real or personal property shall in any way affect the lien for such taxes upon such property.

STATEMENT

On August 28, 1922, a receiver for the Culton-Moylan-Reilly Auto Company, an insolvent corporation, was appointed by the Superior Court of Spokane County, Washington. On March 1, 1921, and March 1, 1922, Spokane County and Whitman County, political subdivisions of the State of Washington, assessed and levied personal-property taxes against the Culton-Moylan-Reilly Auto Company in the total amounts of $6,195.38 and $410.36, respectively. (R. 14.) Thereafter, under order of the court, the receiver sold the personal property of the insolvent corporation and reduced the same to cash, which he held. Subsequently, on September 23, 1924, Spokane County assessed the money in the hands of the receiver for the years 1923 and 1924 and levied taxes thereupon in the total amount of $1,390.10. On December 20, 1926, Spokane

County made a further assessment and levy on the moneys in the hands of the receiver for the years 1925 and 1926 in the total amount of $1,219.52 (R. 15.) On February 28, 1923, and May 2, 1923, additional income taxes and penalties for the years 1917, 1918, 1919, and 1920 were assessed by the United States in the total amount of $70,268.58. (R. 15–16.) The funds in the hands of the receiver are insufficient to pay in full the claims of the United States, Spokane County, and Whitman County. (R. 16.)

On August 11, 1926, Spokane County filed a petition for an order requiring the receiver to pay the county $6,936.09, with interest, to satisfy its tax claims. (R. 1.) Thereupon the receiver was ordered to show cause why he should not satisfy the tax claims of Spokane County. (R. 2.) On August 16, 1926, the United States filed an amended statement of the tax liability of the insolvent corporation and claimed priority in payment by reason of Section 3466, Revised Statutes, and Section 64 (a) of the Bankruptcy Act. (R. 2–3.) On August 24, 1926, the receiver filed his answer, reciting the tax claims of the United States and Spokane County and praying that the question of priority be determined. (R. 4–6.) On September 14, 1926, the receiver advised the court of the tax claim of Whitman County and petitioned that an order be issued directing that county to present its claim and establish its priority. (R. 8.) Thereafter,

the order was issued (R. 9), and on December 15, 1926, the amended answer of Whitman County was filed. (R. 10–11.) On December 21, 1926, Spokane County filed an amended petition increasing the amount of its claims. (R. 11–13.)

As conclusions of law the Superior Court of Spokane County found taxes due Spokane County in the total amount of $8,805, with interest; taxes due Whitman County in the total amount of $410.36, with interest, and taxes and penalties due the United States in the total amount of $70,268.58. It was further found that Spokane County and Whitman County were entitled to priority over the United States, not only as to the county taxes levied against the corporation but for the county taxes for 1923–1926 assessed on the money in the receiver's hands. (R. 16–17.) On appeal to the Supreme Court of Washington the judgment was reversed and priority awarded to the United States. (R. 77.) The matter is before this Court on writ of certiorari.

SUMMARY OF THE ARGUMENT

The priority of the United States under Section 3466, Revised Statutes, attached upon the appointment of the receiver and at that time the counties had no lien. The specific property against which the county taxes for the years 1921 and 1922 were levied has not been identified in the hands of the receiver. Under such circumstances the counties

must resort to the general property of the taxpayer. As to such property the lien of the State does not become fixed until the property is seized by the sheriff. This has not been done and the counties have only a floating lien. The county taxes for the years 1923, 1924, 1925, and 1926 were levied against the moneys in the hands of the receiver. When those assessments were made the priority of the United States had already attached and is superior to any lien which those assessments created.

Section 3186, Revised Statutes, provides that in case of insolvency the amount of any Federal tax shall be a lien from the time when the assessment list was received by the collector. With respect to the taxes for the years 1921 and 1922, the lien of the States has never become fixed. The assessment lists showing the Federal claim were received by the collector prior to the assessments of the county taxes for the years 1923, 1924, 1925, and 1926, and the United States accordingly has a prior lien under the statute. The proviso in the statute designates mortgagees, purchasers, and judgment creditors as the only classes which are required to be favored with notice of the Federal lien and it will not be assumed that Congress intended to require notice to others.

Accordingly, the United States is entitled to priority under Section 3466, Revised Statutes, and the Federal lien created by Section 3186, Revised Statutes, is superior to that of the counties.

ARGUMENT

I

THE PRIORITY SECURED TO THE UNITED STATES BY SECTION 3466 OF THE REVISED STATUTES IS PRIORITY OVER ALL OTHER CREDITORS, INCLUDING A STATE AND ITS SUBDIVISIONS

Article I, Section 8 of the Constitution provides that Congress shall have power to lay and collect taxes and to make all laws which shall be necessary and proper for carrying such power into execution. Article VI further provides that the Constitution and the laws made in pursuance thereof shall be the supreme law of the land. In pursuance of this authority and to facilitate the collection of taxes Congress has enacted Section 3466, Revised Statutes, which provides that debts due to the United States shall be first satisfied whenever any person indebted to the United States is insolvent.

That taxes are "debts" within the meaning of Section 3466, Revised Statutes, is no longer open to question. *Price* v. *United States*, 269 U. S. 492. It is shown that the taxpayer, Culton-Moylan-Reilly Auto Company, was insolvent (R. 14) and did not have sufficient property to pay all its debts. It is not questioned that insolvency within the sense of the statute existed, nor that Section 3466 is applicable. In *United States* v. *National Surety Co.*, 254 U. S. 73, where the question was whether in the distribution of a bankrupt's estate the United

States had priority over a surety company entitled to subrogation under Section 3468, R. S., this Court said (p. 76):

> The priority secured to the United States by Section 3466 is priority over all other creditors; that is, private persons and other public bodies.

"Other public bodies" can only refer to the States and their subdivisions. Obviously, then, the statute as applied to the instant situation contemplates that the Federal taxes shall be satisfied before the claims of the counties.

The question of priority in the payment of taxes under Section 3466 as between the United States and a State has never before been directly presented to this Court. It has, however, been before the District Court for the Western District of Washington in *United States* v. *San Juan County*, 280 Fed. 120, and before the District Court for the Western District of Pennsylvania in *Stover* v. *Scotch Hills Coal Co.*, 4 F. (2d) 748. In both of those cases the priority of the United States was fully sustained. The priority of the United States was also sustained by an unreported decision of the United States District Court for the Eastern District of Washington in a proceeding relating to the very taxes involved in the case at bar. Because the jurisdiction of the State courts had first attached, the judgment of the District Court was reversed for want of jurisdiction. *Merryweather* v.

United States, 12 F. (2d) 407. In the *Stover case* the court said (p. 748):

> The Assistant Attorney General of Pennsylvania contends that, inasmuch as these tax claims of the state became first liens in accordance with the provisions of the Acts of Assembly of Pennsylvania at a date prior to the accruing of the tax claim of the United States, they therefore occupy a position which would entitle them to first payment ahead of the federal claim. The commonwealth of Pennsylvania's claim to priority here rests upon the exercise of its own sovereign power by its own act of assembly and that of the United States also rests on the sovereign powers of the federal government by act of Congress. The two claims here conflict, and in such a case priority must be awarded, both under the Constitutions of the United States and that of Pennsylvania, to the United States. The most recent case which establishes this principle is that of *United States* v. *San Juan County* (D. C.) 280 F. 120, which fully supports the views we have here expressed.

The decisions in the *Stover* and *San Juan County cases* are in harmony with the principles discussed by this Court in numerous cases. In *United States* v. *Snyder*, 149 U. S. 210, the question was presented whether the tax system of the United States is subject to the recording liens of the States. This Court said (p. 214):

> • • • the grant of the power and its limitation are wholly inconsistent with the

> proposition that the States can by legislation interfere with the assessment of Federal taxes * * *.

In *Field* v. *United States*, 9 Pet. 182, it was sought to make the syndics personally liable out of their own funds on account of their having made disbursements out of a bankrupt's estate as to which the United States was entitled to priority. It was objected that the distribution had been made under order of the parish court in an action in which the United States was not a party. This Court held that the United States was not bound to become a party and said (p. 201):

> The local laws of the state could not, and did not, bind them (the United States) in their rights. They could not create a priority in favor of other creditors, in cases of insolvency, which should supersede that of the United States. [Parentheses ours.]

United States v. *Oklahoma*, 261 U. S. 253, was a suit commenced in this Court to establish priority in favor of the United States and to have a debt owing by the State bank paid before any distribution of the assets of the bank. The State asserted that the priority rights of the United States did not apply where a sovereign State had a lien against its debtor. This Court found that the State had no superior lien and said (p. 260):

> Where the debtor is divested of his property in one of the modes specified in the act, the person who becomes invested with the

> title is made trustee for the United States and bound first to pay its debt out of the debtor's property. *Beaston* v. *Farmers' Bank of Delaware*, 12 Pet. 102, 133–135. *The priority given the United States cannot be impaired or superseded by state law.* (Italics ours.)

In *Frick* v. *Pennsylvania*, 268 U. S. 473, the estate from which taxes had to be met was large enough to satisfy both the State and the Federal Government and the question of priority was not involved. However, the priority of the United States was thus referred to (p. 500):

> The two taxes were concurrently imposed and stand on the same plane, *save as the United States possibly might have a preferred right of enforcement if the estate were insufficient to pay both.* (Italic ours.)

In *Florida* v. *Mellon*, 273 U. S. 12, the State of Florida sought to enjoin the collection of Federal inheritance taxes in that State and contended that the enforcement of the Act would result in the withdrawal from Florida of the property of potential taxpayers thereby diminishing the subjects upon which the State power of taxation might otherwise operate. With respect to that contention it was said (p. 18):

> The averment to that effect, however, affords no basis for relief, because, not only is the state's right of taxation subordinate to that of the general government, but the

> anticipated result is purely speculative * * *.

Dealing specifically with Section 3466, this Court said in *Bramwell* v. *U. S. Fidelity Co.*, 269 U. S. 483, 492:

> The established rule of liberal construction requires that the priority act be applied having regard to the public good it was intended to advance. Its application is not to be narrowly restricted to the cases within the literal and technical meaning of the words used.

From these cases it is submitted that the principle is well recognized that the purpose of the statute is to give the United States first claim over all other creditors and that this preference may be asserted, not only as against private persons, but as this Court said in *United States* v. *National Surety Co., supra*, the Federal claim is superior to that of "other public bodies."

The theory of the petitioners as expressed in the dissenting opinion in the Supreme Court (R. 74) is that in collecting its own taxes the Federal Government may not interfere with the collection of State taxes. We submit that this theory results in supremacy of the State law and is fundamentally erroneous. Chief Justice Marshall considered a similar objection in *United States* v. *Fisher*, 2 Cranch 358, where the constitutionality of an earlier priority statute (1 Stat. 515) was put in question. It was there said (p. 396):

> This claim of priority on the part of the United States will, it has been said, interfere with the right of the state sovereignties, respecting the dignity of debts, and will defeat the measures they have a right to adopt, to secure themselves against delinquencies on the part of their own revenue officers. But this is an objection to the constitution itself. The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of congress extends.

Petitioners contend, however, that the decision must turn, not on a conflicting priority but on the fact that the State had a lien on the property under the State law from the time assessment was made and that this lien must be satisfied ahead of the priority of the United States. In this connection, if the counties had a prior lien some support for this contention might perhaps be found in the cases of *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, and *Brent* v. *Bank of Washington*, 10 Pet. 596.

However, the counties have no prior lien and we are not dealing here, as in those cases, with a demand of the United States for priority of a general claim over prior specific liens. The decisions of the Supreme Court of Washington establish that the personal property tax is a personal obligation of the owner of the property at the time of the assessment and also a lien upon the specific personal property charged from and after the date

of the assessment. There is no evidence that such a specific lien exists. While the State law also provides a lien upon all other real and personal property of the person assessed, it is a floating lien which does not become fixed until the property is seized by the sheriff. (Sections 11257 and 11258 Rem. Comp. Stat. (P. C. Sections 6957 and 6958) *supra.*)

In *Wilberg* v. *Yakima County,* 132 Wash. 219, many of the former decisions construing the State statutes providing for specific and general liens upon personal property were reviewed and it was there held (p. 223):

> (1) The amount of the tax is the personal obligation of the person who owned the property at the time of the assessment, which time, we have determined in *Klickitat Warehouse Company* v. *Klickitat County,* 42 Wash. 299, 84 Pac. 860, and *Puyallup* v. *Lakin,* 45 Wash 368, 88 Pac. 578, is the time of the listing of the property by the assessor;
>
> (2) That the tax is to be collected, if such property still continues in the hands of the person against whom it was assessed, from such property;
>
> (3) If that specific property does not exist in such hands, the amount of the tax may be collected as a lien upon all the real and personal property of the person assessed, and may be collected from the other personal or real property of such person;

(4) And if it is to be collected from the personal property, it does not become a lien upon such property until it has been seized and distrained by the sheriff, under sections 11257 and 11258, Rem. Comp. Stat. (P. C. sections 6957, 6958.) *Pennington* v. *Yakima County, supra.*

(5) If it is to be collected from the real property, the method is provided by section 11283, Rem. Comp. Stat. (P. C. section 6952), which provides for the swearing by the county treasurer of the personal property tax onto specifically selected real property. *Scandinavian American Bank* v. *King County, supra.*

See also *Pennington* v. *Yakima County,* 127 Wash. 538, and *Minshull* v. *Douglas County,* 133 Wash. 650.

Applying the above principles to the first two of the six years here involved, it appears that on March 1, 1921, and March 1, 1922, petitioners assessed and levied personal property taxes for the years 1921 and 1922 against the Culton-Moylan-Reilly Auto Company. The taxes were not collected and on August 28, 1922, the company then being insolvent, a receiver was appointed. (R. 14.) The priority in favor of the United States attached upon the appointment of a receiver. *United States* v. *Oklahoma,* 261 U. S. 253, 260. Thereafter, under order of the court, the personal property of the insolvent corporation was sold by the receiver and reduced to cash. (R. 15.) Under these circum-

stances, therefore, it is clear that petitioners have no specific lien, because the specific property against which the taxes were levied is no longer in the possession of the company against which the taxes were assessed. As the delinquent taxes do not become a general lien until other real and personal property has been seized and distrained by the sheriff and as the record does not disclose that the necessary procedure has been followed, it is submitted that neither have petitioners a general lien. That the counties have no lien is pointed out in the concurring opinion (R. 73):

> It seems clear to me that each of these two tax debts primarily came into existence by the levy of a tax in personam, and not by the levy of a tax in rem. I think a critical reading of the revenue legislation of the respective sovereignties, the United States and the state, and the record in this case showing the manner of the levying of these respective taxes, will render this plain. The revenue legislation of each has prescribed procedure by which its personam tax debts may be made specific liens upon property of one personally owing such tax debt. This record, I think, warrants the conclusion that neither the United States, the state of Washington nor Spokane County for the State of Washington has ever, by the prescribed statutory procedure, perfected its inchoate tax lien right against any of the property of which the funds here in question are the proceeds.

The claims of the counties as to the other four years (1923, 1924, 1925, and 1926) involve personal property taxes levied upon the moneys in the hands of the receivers. The assessments were not made until after the appointment of the receivers and at that time the priority of the United States had already attached, *United States* v. *Oklahoma, supra,* and could not be displaced. Accordingly, petitioners have no lien as to any of the six years involved such as would take precedence over the claim of the United States.

Apparently to escape the result of this argument petitioners assert that when the receiver sells assets subject to a lien the lien is transferred from the specific items sold to the funds in the hands of the receiver, citing *State ex rel. Dooley & Co.* v. *Superior Ct.*, 128 Wash. 253, and *Western Electric Co.* v. *Norway P. C. & D. D. Co.*, 126 Wash. 204.

In the *Dooley Case* certain property held by a court receiver was subject to a judgment lien. To conserve the rights of the parties the court ordered a sale of the property, free of this lien. The State Supreme Court merely held that, in administering the property of an insolvent the court might in its discretion sell free from a lien, allowing the lien to attach to the fund received from the sale. In the *Western Electric Case* it was held that where the State had a lien on property for taxes that that lien applied when the property came into the hands of a receiver. The court then made the following

very pertinent distinction, which, it is suggested, has a present application (p. 210):

> Here the very property assessed was in the custody of the court. There were no claims of intervening subsequent purchasers. Other than that the receiver had taken possession of the property on the order of the court, there was no change of title or possession after the time the tax was levied. Seemingly, if the taxes could be a lien in any case, it could be so in this. There is nothing in the case of *Raymond* v. *King County*, 117 Wash. 343, 201 Pac. 455, contrary to the rule we here announce. *In that case the taxes sought to be enforced against the specific property there in question were not taxes levied upon the specific property. That was a personal tax against an individual, and it was sought to charge the property with the tax because the individual owing the tax once owned the property, although he had long since parted with its title and possession. This we held the county could not do,* but plainly the case furnishes no ground for holding there is no specific lien in this instance. (Italics ours.)

Even if the rule contended for by petitioners were well established—and it can hardly be said that the cited cases establish it in the State of Washington—still it is submitted that it could have no present effect. The record in no way shows that the *specific property* on which the State assessed its tax (save that on the money held by the receiver which was only assessed *after* the priority of the United

States had attached) ever came into the hands of the receiver or was, by him, sold. In the absence of facts to support this it can not he held that the State had more than a floating lien; this has never attached to any specific property in the hands of anyone.

To obtain the benefit of the rule there would seem little question but that the State must affirmatively identify the property held by the receiver as the identical property against which the tax was assessed. See *Wilberg* v. *Yakima County, supra.* This the petitioners have not done.

Those cases, therefore, do not support petitioners' contention that the specific lien of the counties has been transferred to the moneys in the hands of the receivers. Under these circumstances it is submitted that the claim of the United States is superior to that of the counties and that the United States is entitled to priority under the provisions of Section 3466, Revised Statutes, as to all of the years involved.

But even if the situation were otherwise and the claim of the United States was not preferred by the statute it would still be true that the Federal claim antedates the claim of the counties. The counties claim taxes for the years 1921, 1922, 1923, 1924, 1925, and 1926. The liability for Federal income taxes relates to the years 1917 to 1920, inclusive. It is settled that no assessment of the Commissioner of Internal Revenue was necessary for

the collection of a tax at least in a direct action by the United States. *The Dollar Savings Bank* v. *United States*, 19 Wall. 227; *United States* v. *Chamberlin*, 219 U. S. 250; *New York Life Ins. Co.* v. *Anderson*, 257 Fed. 576. The failure of the taxpayer to make proper returns does not make the taxes which should have been paid before any the less of a debt from the time they ought to have been paid. *King* v. *United States*, 99 U. S. 229.

It is settled that the appointment of a receiver and the taking of property into the hands of the court through its officer do not withdraw it from taxation. *In re Tyler*, 149 U. S. 164, 182. In some cases it has been held that taxes levied upon personal property in the hands of a receiver become a charge upon the estate and are properly payable as a part of the costs of administration. *Wiswall* v. *Kunz*, 173 Ill. 110; *Gehr* v. *Iron Co.*, 174 Pa. St. 430.

However, the authorities are not uniform. In *State of New Jersey* v. *Lovell* (C. C. A. 3rd), 179 Fed. 321, the property of a bankrupt corporation was covered by fixed liens and all moneys released from its unencumbered effects were required to pay expenses incurred by the receiver in preserving its property. The State of New Jersey contended that all of said funds should be applied to pay a franchise tax it had imposed upon such corporations. The report of the decision of the District Court (*In re Halsey Electric Generator Co.*, 175 Fed. 825) shows that these taxes were assessed for years both

before and after the appointment of the receiver. The District Court ordered that the fund be applied to pay the actual and necessary cost of preserving the estate subsequent to filing the petition. From that order the State appealed to the Circuit Court of Appeals where the decree of the court below was affirmed. This Court denied certiorari, 219 U. S. 587.

In *Chesapeake & Ohio Ry. Co.* v. *Atlantic Trans. Co.*, 62 N. J. Eq. 751, it was held that the receiver's allowance and the expense of winding up an insolvent corporation were entitled to priority of payment over a State franchise tax levied by the State during the receivership.

Without indicating whether the taxes were levied against property in the hands of the receiver or against the corporation before insolvency, the cases hold generally that taxes constitute a claim upon the assets in the hands of the receiver superior to every other claim except costs and that tax claims are not entitled to priority over expenses of administration. *In re Oxley*, 204 Fed. 826; *In re Wyley Co.*, 292 Fed. 900; *In re Jacobson*, 263 Fed. 883.

The record in this case shows that the expenses of administration were given priority over petitioners' tax claims including those assessed against the receiver. (R. 17.) Section 3466, R. S., may be open to the construction that it gives priority to debts owing to the United States from the insolvent, only over debts owing to others from the in-

solvent and not over debts of the receiver arising after insolvency. Had the taxes levied upon the personal property in the hands of the receiver been considered as a part of the administration expenses and so given priority as in the nature of a current personal obligation of the receiver himself, the United States would hesitate to claim priority over the county taxes for the years 1923, 1924, 1925, and 1926, levied after the receiver was appointed. However, they were not so treated in the State courts and the petition for the writ of certiorari does not raise that question. The petition was based solely on the ground that the right of the State and its subdivisions to levy and collect taxes to maintain its institutions is immune from interference by the United States. Neither in the petition for certiorari, supporting brief, nor final brief of the petitioners is any point made that Section 3466 does not give priority over taxes assessed after receivership, as distinguished from those assessed before. (Pet. 9.) Under the settled rule that question will not be considered. *Commercial Credit Co.* v. *United States*, 276 U. S. 226, 229, and cases cited.

The contention that the statute can not apply to petitioners because they are not enumerated therein is obviously without merit. The rule that the sovereign does not bind itself by its own statutes unless that intention is clearly shown is entirely without application. We are not considering here whether the United States bound itself by its own

statutes nor whether the State bound its subdivisions by Act of its own legislature. The question here is whether the language of Section 3466, "the debts due to the United States shall be first satisfied," gives the United States priority over the claim of a State. This Court has already said that the section secures to the United States "priority over all other creditors; that is, private persons and other public bodies." *United States* v. *National Surety Company, supra.*

Nor are the cases dealing with the respective jurisdictions of the Federal and State Governments inconsistent with the claim of the United States to priority. Petitioners rely very strongly upon certain dicta expressed by this Court in the cases of *In re Tyler*, 149 U. S. 164; *Lane County* v. *Oregon*, 7 Wall. 71; *The Collector* v. *Day*, 11 Wall. 113; and *McCulloch* v. *Maryland*, 4 Wheat. 316. It is believed, however, that the basic difference in the subject matter in those cases presented to the Court and the further qualifying remarks of the Court, not adverted to by petitioners, will clearly explain and distinguish those cases from the instant case.

The opinion of this Court *In re Tyler, supra*, is quoted from to the effect that the lien of a State for taxes is superior to the claim of other creditors. That is unquestionably true as to private creditors, which were the class which the Court there apparently considered. The words of the Court are to be construed as answering only the question

before it, and can not be enlarged so that they embrace other thoughts in no way pertinent to the matter there in controversy.

The *Tyler case* arose out of a levy by a State officer for taxes on property held by a receiver for a United States court, contrary to an injunction issued by that court, and came to this Court on habeas corpus proceedings brought by the State officer to escape a contempt sentence. It is thus apparent at the outset that there is no similarity between that and the instant case.

This Court, in denying the writ, held that, while the State taxes were charges on the property held by the receiver, they were not subject to seizure by a State officer, and took occasion to define, so far as there relevant, the jurisdiction of the State. The question there related to the limits of Federal and State jurisdiction. Here jurisdiction is not involved, as the jurisdiction of both is conceded, but the question here is, which of these concurrent jurisdictions is to take precedence over the other. Obviously, that of the superior. It may be noted, as indicative of the thought of this Court, that the much more relevant opinion in *United States* v. *Snyder*, 149 U. S. 210 (see hereafter), was handed down only one week after that of the *Tyler case*.

Neither is it believed that the isolated quotations from *Lane County* v. *Oregon*, *supra*, used by petitioners, when taken in relation to the entire opinion, sustain their contention.

Under an Act of the legislature, county treasurers were required to pay taxes to the State Treasury in gold or silver. A law of the United States in force at that time made United States notes legal tender. The action involved the construction of the Oregon law in view of the United States statutes. This Court, in holding the Oregon law valid, dealt with the question of State jurisdiction. It concluded that the United States statute was not intended to affect what was purely a question of State jurisdiction. This is obviously true, as it can not be denied that the State may levy and collect its own taxes in any medium it sees fit. The distinction here, as in the preceding case, is that jurisdiction is not here involved, but, admitting jurisdiction of both governments, the question is, which is entitled to priority?

Petitioners here admit the soundness of the Court's pronouncement in that case that in case of a "tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred." (R. 31.)

Petitioners, thereafter, however, attempt to make inapplicable that rule by stating that in the instant case the tax of the United States was on income whereas that of the State was on personal property. The materiality of this distinction can not be perceived. Where two governments may tax, and as an incident of that right, may enforce the collection

of that tax, the subject from which the tax is collected is purely incidental, and where both can not be satisfied, the superior must take precedence.

In *The Collector* v. *Day*, 11 Wall. 113, the same essential difference is presented. The question here was as to the right of the United States to tax the salary of a State judicial officer. This Court held that to allow the United States to tax the agencies of a State would be to give to the United States a weapon with which it could destroy the State, employing the reasoning of Mr. Justice Wayne in *Dobbins* v. *Erie County*, 16 Pet. 435. The opinion develops the distinctness of the Federal and State sovereignties, and concludes that such a tax was beyond the power of the Federal Government. Thus, there is not involved a question of conflict where jurisdiction is established but, essentially, one of jurisdiction itself.

McCulloch v. *Maryland*, 4 Wheat. 316, denies to the State the right of taxing a national bank. This case is the fountain head of all which have followed, distinguishing the powers of the Federal from those of the State sovereignties. Broadly, it holds them to be distinct and separate, but its conclusion, elaborately reasoned and in perfect consonance with the position of the United States in the instant case, is that in the event of conflict between the sovereignty of the United States and that of a State, the former must prevail.

II

THE LIEN OF THE UNITED STATES UNDER SECTION 3186, REVISED STATUTES, IS PRIOR TO ANY LIEN OF THE COUNTIES

In the foregoing argument we have contended that the claim of the United States for taxes should be preferred over all other claims by reason of the provision of Section 3466, Revised Statutes. While we are confident that that statute is entirely adequate to support the judgment of the court below we think it may also be said that the United States has a prior lien upon all of the property belonging to the Culton-Moylan-Reilly Auto Company. In furtherance of its constitutional power to lay and collect taxes Congress enacted Section 3186, Revised Statutes. This statute provides such a lien in the case of delinquent taxpayers from the time when the assessment list was received by the collector. The assessment lists showing the assessments of additional Federal income taxes for the years 1917, 1918, and 1919 were received by the Collector of Internal Revenue on March 5, 1923, and the assessment list for the year 1920 was received by the Collector on May 7, 1923. (R. 16.) By the express terms of the statute the amount of these assessments at once became a lien in favor of the United States upon all property and rights to property belonging to the taxpayer.

It was not until September 23, 1924, that Spokane County assessed the moneys in the hands of the re-

ceiver for the years 1923 and 1924. The assessment on these funds for the years 1925 and 1926 was made still later, on December 20, 1926. (R. 15.) These are the only assessments upon specific property in the hands of the receiver and the lien of the United States under Section 3186 is prior to any liens which they may have created.

It is contended, however, that the lien is not valid as against the counties for the reason that no notice was filed in the office of the clerk of the court for the district wherein the property was situated. Since Congress has provided that such a lien shall be inferior to the liens of mortgagees, purchasers, and judgment creditors whose rights attach prior to the notice of the filing of a lien of the United States, it is contended that it is consistent with the legislative purpose to assume that it was also the intention to subordinate the Federal claim to that of a State. It is said that under the law of Washington the lien of the State for taxes is superior to that of mortgagees and judgment creditors and hence if the United States subordinates itself to mortgagees and judgment creditors it follows that it likewise subordinates itself to the State.

It is submitted that this contention is without merit. Inherently the lien of the United States is superior to the lien of a State or of subsequent judgment creditors, purchasers, or mortgagees without notice and it was not until the adoption of the proviso to Section 3186 by the Act of March 4, 1913, c. 166, 37 Stat. 1016, that Congress determined to

relax the rule. Prior to that time this Court held the lien of the United States superior to the claim of a bona fide purchaser without notice, *United States* v. *Snyder*, 149 U. S. 210, and superior to that of a mortgagee. *Blacklock* v. *United States*, 208 U. S. 75. In *United States* v. *Curry*, 201 Fed. 371, Judge Rose called attention to the harshness of the rule and the proviso was thereafter adopted by the Act of 1913, *supra*. There were reasons of policy for saving the rights of those who parted with something in ignorance of the Federal claim, but no such reason exists in the case of State taxes. The State parts with nothing when it levies a tax and Congress did not include the State within the proviso. We submit that the doctrine *inclusio unius est exclusio alterius* prevents the extension of the proviso to embrace State taxes. Their omission from the proviso is conclusive that Congress did not intend to subordinate the collection of Federal taxes to the collection of State taxes. *United States* v. *Dickson*, 15 Pet. 141, 165; *Ryan* v. *Carter*, 93 U. S. 78, 83. See also *United States* v. *Woodward*, 256 U. S. 632. To do so would reverse the established order of preference. See *Lane County* v. *Oregon*, 7 Wall. 71, 77; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 153.

Ferris v. *Chic-Mint Gum Co.*, 14 Del. Ch. Rep. 232, does not support petitioners' contention that the claim of a State should be accorded priority over that of the United States. The court there said (p. 240):

> * * * it has not been necessary to examine the general question of the relative rights of Federal and State governments in asserting their respective claims for taxes.

Priority was accorded the State in that case solely by reason of the fact that it was entitled to a preference over a third creditor as to which the United States had specifically subordinated itself. The unusual situation there presented is shown by the following language from the opinion (p. 239):

> Here we have three claimants, each claiming certain preferences. The first (the State, County and City) admittedly outranks the second (the mortgagee) and we have seen that the second outranks the third (the United States). Yet it is contended that the third is to be preferred to the first and thus displace the second from a position of preference over the third. If this contention be accepted then indeed will the last be declared to be first. When the government agreed by *Section* 3186 to take rank after the mortgagee, it must necessarily follow that it is subordinate in rank to those who are superior to its immediate senior.

There is no such third creditor here, and, therefore, the case is not in point. Furthermore, the relative priorities could have been maintained in that case by setting apart sufficient funds to pay the mortgage before paying the Federal taxes and then providing for payment of the State tax out of the sum so set apart.

Accordingly we submit that the proviso of Section 3186 does not surrender to the States the ancient superiority of a Federal tax lien. Therefore, since the Federal lien is prior in time to any lien which the counties may have, the United States is entitled to preference in the payment of its tax claim.

CONCLUSION

In view of the foregoing it is respectfully submitted that the judgment of the Supreme Court of Washington should be affirmed.

Respectfully submitted.

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